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BEFORE THE ARIZONA CORPORATION COMMISSION

JUN 1 4 09 PM '99

JIM IRVIN
Commissioner-Chairman
TONY WEST
Commissioner
CARL J. KUNASEK
Commissioner

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IN THE MATTER OF:

FOREX INVESTMENT SERVICES
CORPORATION
2700 North Central Avenue, Suite 1110
Phoenix, Arizona 85004

DOCKET NO. S-3177-I

RESPONDENTS' RESPONSE TO
SECURITIES DIVISION'S
POST-HEARING MEMORANDUM

et al.,

Respondents.

Respondents¹ submit their Response to the Securities Division's Post-Hearing Memorandum.²

This Response is supported by the attached Memorandum of Points and Authorities.

DATED this 1st day of June, 1999.

ROSHKA HEYMAN & DEWULF, PLC

Arizona Corporation Commission
DOCKETED

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By

Paul J. Roshka, Jr.
Alan S. Baskin
Two Arizona Center
400 North 5th Street, Suite 1000
Phoenix, Arizona 85004
Attorneys for Respondents

¹ The term "Respondents as used in this brief refers to all Respondents with the exception of Mr. Simmons. All individual Respondents will be referred to by their last names, with the exception of Peter Suen Suk Tak, who will be called "Mr. Suen." Forex Investment Services Corporation will be referred to as FISC; Eastern Vanguard Forex Limited will be referred to as "EVFL", while Eastern Vanguard Group will be referred to as "EVG." Finally, Y&T, Inc. will be referred to as "Tokyo." Hearing Exhibits will be cited herein as "(Ex. __)". The hearing transcripts will be cited as "(R.T. __/__/98, at __)."

² Respondents still claim that the Commission lacks jurisdiction over this matter, and the arguments in this brief in no way constitute a waiver of that argument.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Commission must give no weight to the Securities Division's Post-Hearing Memorandum for the following reasons:

1. The Division set forth the improper standard for determining whether any of the alleged "primary" Respondents offered or sold investments in FISC. Assuming arguendo that *S.E.C. v. Rogers*³ is applicable to the present matter, none of the Respondents offered or sold investments in FISC under that standard.

2. The Division's reliance on *Barnes v. Vozack*⁴ does not support a finding that any of the "primary" Respondents violated A.R.S. § 44-1991.

3. The Commission must reject the Division's allegations regarding violations of A.R.S. § 44-1991.

4. The Division proposes a controlling person analysis that rejects the majority view and misstates the caselaw on which the Division relies.

5. The Division's proposed legal analysis regarding the "good faith" defense to controlling person allegations is untenable.

6. If the Commission orders payment of any penalties or restitution it should be against Respondent Simmons, and none of the other Respondents.⁵

³ 790 F.2d 1450 (9th Cir. 1986).

⁴ 113 Ariz.269, 550 P.2d 1070 (1976).

⁵ Respondents' decision to limit this pleading to the above areas does not constitute acquiescence in or agreement with any argument or assertion made in the Division's Post-hearing Memorandum. Rather, Respondents have already presented their arguments in detail in their Memorandum and are thus focusing on some of the more glaring weaknesses in the Division's Memorandum.

1 **II. The Division set forth the improper standard for determining whether any of the**
2 **Respondents offered or sold investments in FISC. Assuming arguendo that *Rogers* is**
3 **applicable to the present matter, none of the alleged “primary” Respondents offered or sold**
4 **investments in FISC under that standard.**

5 The Division devotes the majority of its attention in the “Offerors and/or Sellers” portion of its
6 Memorandum to the claim that Mr. Cho was primarily responsible for *all* sales of investments in FISC.
7 The Division relies on *S.E.C. v. Rogers*, 790 F.2d 1450, 1456 (9th Cir. 1986) in support of this
8 argument. The Division ignores recent Arizona caselaw setting forth the appropriate standard for
9 determining whether an individual is primarily liable for violating the Securities Act. *See* A.R.S. §
10 44-2003; *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 17-23, 945 P.2d 317, 328-34 (App.
11 1996) *review denied*, October 21, 1997.

12 A.R.S. § 44-2032(1) authorizes the Division to bring administrative actions against any “person”
13 who violates the Act. Pursuant to A.R.S. § 44-2003, however, liability for violations of the Act extends
14 only to individuals who “made, participated in or induced the unlawful sale or purchase...” A.R.S. §
15 44-2003; *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 17-23, 945 P.2d 317, 328-34 (App.
16 1996) *review denied*, October 21, 1997. The Arizona Court of Appeals has recently set forth the
17 standard necessary to establish liability for “participating” in or “inducing” the sale of securities for
18 purposes of A.R.S. § 44-2003. *Standard Chartered*, 190 Ariz. at 17-23, 945 P.2d at 328-34.⁶ The court
19 held that a party must “partake” in the sale of securities in order to “participate” in the transaction. *Id.* at
20 21, 945 P.2d at 332. To induce the sale of securities, a party must purposefully or intentionally cause
21 the sale. *Id.* at 21-22, 945 P.2d at 332-33. Likewise, a party must “persuade” or “prevail” upon another
22 individual to buy a security in order to “induce” the sale of securities. *Id.* at 21-22, 945 P.2d at 332-33.
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25 ⁶ The *Standard Chartered* decision construed the terms “participated in” and “induced” under the former version of A.R.S. §
26 44-2003, which applied only to actions brought under A.R.S. §§ 44-2001 and 44-2002. A.R.S. § 44-2003, however, has been
27 amended, and now also applies to actions brought under A.R.S. § 44-2032. The amended version of A.R.S. § 44-2003
includes the “participated in” and “induced” language that was in the earlier version of the statute. Accordingly, the
Commission must defer to the court’s interpretation of A.R.S. § 44-2003.

1 The court further held that to make, participate in or induce the sale of a security: 1) a party must
2 have more than a collateral role in the sale; and 2) any alleged misstatements made by the party must go
3 beyond “merely [having] the effect of influencing a buyer” to purchase the security. *Id.* at 22, 945 P.2d
4 at 333.

5 In reaching its holding, the court specifically declined to apply caselaw construing the federal
6 securities statutes. 190 Ariz. at 18, 945 P.2d at 329. The court stated: “[b]ecause, however, there is no
7 counterpart in [the federal statutes] to the participation or inducement standard of our state statute, the
8 federal statutes do not guide us here.” *Id.* The court of appeals’ mandate renders meaningless the
9 Division’s reliance on federal cases in connection with its discussion of primary liability. The
10 Commission must use its common sense and apply Arizona law construing the Arizona Securities Act,
11 and not apply plainly inapposite caselaw related to a dissimilar statutory scheme.

13 Respondents’ Post-Hearing Memorandum documented the complete lack of evidence that Mr. Cho
14 offered and sold investments to any of the FISC investors, and that discussion will not be repeated here.
15 Rather, Respondents simply refer the Commission to pages 10-22 of the Post-Hearing Memorandum.
16 Respondents also remind the Commission that, with the exception of Mr. Simmons and Mr. Cho, the
17 Division makes no arguments that any other individual Respondent is primarily liable for any violations
18 of A.R.S. §§ 44-1841 and 44-1842. Accordingly, all allegations against the remaining Respondents
19 must be dismissed.
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1 **A. Assuming arguendo that *Rogers* is applicable to the present matter, Mr. Cho did not**
2 **offer or sell investments in FISC under that standard.**

3 If the Commission disregards Arizona law and applies *Rogers*, it must also conclude that Mr. Cho
4 did not offer or sell any investments in FISC⁷ Under *Rogers*' substantial factor-proximate cause
5 analysis an individual may be liable for the sale of securities if the individual was "directly responsible"
6 for the distribution of unregistered securities. 790 F.2d at 1456. A person is directly responsible for the
7 sale of securities if his conduct was 1) necessary to and 2) a substantial factor in the transaction. *Id.*
8 The first prong of the standard requires that the defendant's conduct be a "but for" cause of the sales,
9 and the second prong requires that the defendant's participation be more than *de minimis*. *Id.* The
10 Supreme Court of Washington has refined the substantial factor-proximate cause analysis to require
11 consideration of the following factors: 1) the number of other factors contributing to the sale and the
12 extent of the effect they have in producing it; 2) whether the defendant's conduct created a force or
13 series of forces which are in continuous and active operation up to the time of the sale; and 3) lapse of
14 time. *Haberman v. Public Power Supply System*, 109 Wash 2d. 107, 131, 744 P.2d 1032, 1052 (1987).
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16 The Division makes the sweeping and unsupported claim that, "[b]ut for [Mr.Cho's] participation,
17 the 16 investments made during his tenure as manager would not have occurred." When the substantial
18 contributing factor analysis is applied to the present case, however, it compels a determination that
19 Mr. Cho is not responsible for the sale of any investments in FISC. As a threshold matter, the
20 Commission must remember that the Division only called a handful of investors at the hearing. The
21 Commission must not conjecture as to the details of investments that were not the subject of hearing
22 testimony. It is thus impossible for the Commission to determine that Mr. Cho was a factor or played
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26 ⁷ Although Respondents recognize that Mr. Cho may have traded Mr. Saxon's and Mr. Choi's accounts, Respondents'
27 Memorandum urged the Commission to properly use its discretion and not order Mr. Cho to pay any restitution or
penalties. Respondents renew this argument.

1 any role in the investments of the non-testifying investors. The Commission must dismiss all allegations
2 against Mr. Cho that are unsupported by investor testimony.

3 Turning to the investors who testified at the hearing, the arguments regarding Mr. Cho made in
4 connection with the primary liability analysis urged by Respondents apply with equal force to the
5 substantial contributing factor analysis espoused by the Division. These arguments were set forth in
6 detail in Respondents' Memorandum and will not be repeated here.

7 The substantial contributing factor/proximate cause analysis does, however, raise some additional
8 issues that merit discussion herein. In addition to the complete lack of evidence related to Mr. Cho's
9 participation in the investments of the non-testifying investors, the evidence related to nearly all of the
10 testifying investors established that the Division cannot meet its burden of proving his participation as to
11 those individuals. To begin with, even the perjury-plagued testimony of Alan Davis, the Division's star
12 witness, established unequivocally that Mr. Cho did not participate in Mr. Simmons' sale of an
13 investment in FISC to Mr. Davis. Mr. Davis specifically testified that he did *not* meet Mr. Cho during
14 his first visit to FISC. (R.T. 8/27/98, at 117.) Rather, after meeting with Mr. Simmons, Mr. Davis was
15 very "excited" because of all the statements *Mr. Simmons* made to him. (*Id.* at 117-18.). Mr. Davis:
16 "went home and talked with my wife, and *we decided to open an account up with Forex through James.*"
17 (*Id.* at 119.)

18 After deciding to invest, Mr. Davis went to the FISC offices for a second meeting, and Mrs. Davis
19 came with him. (*Id.* at 126-27.) Mr. Davis agreed that there was "*no doubt in [his] mind*" that he met
20 Mr. Cho for the first time *after* he had invested and Mr. Cho performed the ministerial task of receiving
21 Mr. Davis' check. (R.T. 9/9/98, at 868.) Further, according to *both* of Mr. Davis' versions of events,
22 the evidence at hearing conclusively established that Mr. Simmons had a preexisting relationship with
23 Mr. Davis; Mr. Simmons made the pre-investment representations to him; Mr. Simmons met alone with
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1 Mr. Davis at FISC to induce him to invest; Mr. Davis decided to invest before he met Mr. Cho;
2 Mr. Simmons sold the FISC investment to Mr. Davis; and Mr. Simmons completed the new account
3 paperwork for the Davises. Mr. Cho did not participate within the meaning of *Rogers* in the sale of any
4 investment to Mr. Davis.

5 After Alan Davis invested in FISC, he told his parents Dean and Melba Davis about his
6 investment, and his relationship with Mr. Simmons, and repeated to them the representations “*James*
7 [*Simmons*]” had made to them regarding the expected return on an investment with FISC. (R.T.
8 8/28/98, at 421-22.) “After I had met with James at work and spoke to him and opened my account, I
9 was excited and I went home and told my parents about my new investment and what it would do, and
10 explained it to my father and mother.” (R.T. 9/9/98, at 739.) Mr. Davis then spoke with Mr. Simmons,
11 not Mr. Cho, about the possibility of the elder Davis’ investing. (*Id.* at 741-742.)

13 Dean and Melba decided to invest based on information *Alan* provided them about FISC. (*Id.* at
14 743-44; R.T. 9/10/98, at 1014-17.) In particular, Melba invested based on information she believed
15 Alan was getting from Mr. Simmons; not Mr. Cho. (R.T. 9/10/98, at 1014-17.) *After* the elder Davis’
16 made their decision to invest, they met with Mr. Simmons at FISC to formalize their investment. (R.T.
17 9/9/98, at 745-46.) The Davises did not meet Mr. Cho until *after* they had completed the documents
18 evidencing their investment. (*Id.* at 747; R.T. 9/10/98, at 967.) In other words, Mr. Cho did not sell the
19 FISC investment to Melba and Dean Davis; Alan Davis and James Simmons did.

21 Van and Ruth Shumway invested in FISC after learning about it from Dean Davis and then
22 meeting with Mr. Simmons. (R.T. 9/10/98, at 1062-75.) Before investing in FISC, the Shumways made
23 two visits to FISC’s office. They met Mr. Cho during their first visit and did nothing more than
24 exchange pleasantries. (R.T. 9/14/98, at 1425.) The Shumways next met Mr. Cho *after they had*
25 *invested and given their check to Mr. Simmons.* (R.T. 9/10/98, at 1071-78.) According to
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1 Ms. Shumway, Mr. Cho "just greeted us and said that he was happy that we had decided to invest with
2 him, just the usual." (R.T. 9/10/98, at 1082.) Further, Ms. Shumway agreed that she was not "terribly
3 concerned" about asking questions of Mr. Cho because the Shumways were dealing with Mr. Simmons
4 and they believed Mr. Simmons would give them all necessary information about FISC. (R.T. 9/14/98,
5 at 1425.) In other words, Mr. Cho was no factor in the Shumways investment.

6 Mr. Noriega worked at Roadway with Alan Davis, who referred Mr. Noriega to Mr. Simmons for
7 an investment in FISC. (R.T. 9/11/98, at 1202-04.) Mr. Noriega then had several conversations with
8 Mr. Simmons regarding FISC, and based upon Mr. Simmons' recommendations, decided to open an
9 FISC account. (*Id.* at 1203-07.) According to Mr. Noriega, Mr. Simmons "was the person that I knew
10 and I trusted." (*Id.* at 1208.) As was the case with the Davises and the Shumways, Mr. Cho played no
11 role in Mr. Noriega's investment decision, nor did Mr. Cho solicit an investment from Mr. Noriega.
12 Rather, Mr. Simmons introduced Mr. Noriega to Mr. Cho *after* Mr. Noriega gave his check to
13 Mr. Simmons. (*Id.* at 1211-12.) Further, on cross-examination, Mr. Noriega admitted that when he met
14 Mr. Cho, they did not discuss Forex trading or anything else, because Mr. Noriega was relying on
15 Mr. Simmons. (*Id.* at 1264.) Once again, Mr. Cho was a non-factor in Mr. Noriega's investment.

16 Willis Scott opened his account on October 30, 1997, the day before Mr. Cho left FISC, and did
17 not make any trades until after Mr. Cho left FISC. (R.T. 8/28/98, 297, 361, 370; Ex. R-38.) Mr. Scott
18 and everyone else at FISC knew Mr. Cho was leaving when he (Mr. Scott) opened his account. (R.T.
19 8/28/98, at 361; R.T. 10/8/98, at 2245.) Mr. Scott testified that Mr. Cho left FISC "within a day of me
20 actually opening my account," and Mr. Scott was aware that Mr. Cho would not be helping manage his
21 account. (*Id.* at 297, 361.) This testimony renders it impossible for Mr. Cho to have been a substantial
22 factor in his investment decision because Mr. Cho was leaving and Mr. Scott was well aware of this.
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1 William Nagorny, not Mr. Cho, offered and sold an investment in FISC to his father, Julius
2 Nagorny. William Nagorny also went through the training program described above, and testified that
3 he never would have induced his father to invest had he been troubled by *anything* in the training
4 program. (R.T. 9/1/98, at 664.) He was well aware of the risks involved in foreign currency trading; he
5 had in-depth instruction regarding FISC's disclosure documents; he solicited his father for an investment
6 in FISC; and he did all of the trading and made all of the ultimate decisions in his father's account.
7 (R.T. 9/1/98, at 621-22, 664-66, 687.)
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9 Mr. Cho *never* talked to Julius Nagorny about FISC. (R.T. 10/8/98, at 2248-49.) Further, the
10 Nagorny account was opened on October 28, 1997, three days before Mr. Cho left FISC; its first trades
11 were *after* Mr. Cho had left; and Mr. Cho played no role in the management of the account. (R.T.
12 10/8/98, at 2248-49; R.T. 9/1/98, at 627-28, 685-87.) Mr. Cho was not part of the Nagorny investment
13 equation; he never spoke to Mr. Nagorny; he did not offer or sell any investment in FISC to Julius
14 Nagorny; and he did not participate in the management of the account.
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16 The Commission must disregard any testimony by William Nagorny that he believed Mr. Cho was
17 going to help manage Julius Nagorny's account because it is simply not credible. First, it is simply hard
18 to believe that Robert Nagorny was unaware that Mr. Cho was leaving even on the dawn of Mr. Cho's
19 departure. In fact, Mr. Nagorny's testimony on this issue is contradicted by Mr. Scott, who opened his
20 account on virtually the same day as Julius Nagorny and was well aware that Mr. Cho was leaving FISC.
21 (R.T. 8/28/98, at 361.) Further, Mr. Nagorny's version of events is contradicted by common sense
22 because it is undisputed that no trades were made in the account until *after* Mr. Cho left FISC, and
23 Mr. Cho played no role in the management of the account. If Mr. Cho had been such a momentous
24 factor in the opening of the Nagorny account, William Nagorny would have closed the account as soon
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1 as he learned of Mr. Cho's departure, which was *before* any trades were made. Mr. Cho did not
2 participate in William Nagorny's sale of an FISC investment to Julius Nagorny.

3 The evidence as to the above witnesses demonstrates that the Division is unable to clear the "but
4 for" hurdle of the substantial contributing factor analysis. The Davises, the Shumways and Noriega all
5 invested because of Mr. Simmons, not Mr. Cho. The Division presented no evidence that *any* of these
6 individuals would have not invested or that the sales would not have occurred but for Mr. Cho. To the
7 contrary, Mr. Simmons, and no one else, sold the FISC investment to these individuals. Likewise,
8 Mr. Cho's participation in the investments of the above was non-existent, let alone *de minimis*. Further,
9 the hearing testimony established that it was impossible for Mr. Cho to have been a substantial
10 contributing factor in connection with the Scott and Nagorny accounts because Mr. Cho was leaving
11 FISC at the time these accounts were opened and played no role in their management.

13 The *Haberman* refinements to the substantial contributing factor analysis are also instructive in the
14 present context. In particular, *Haberman* requires consideration of the "number of other factors
15 contributing to the sale and the extent of the effect they have in producing it." 109 Wash 2d. at 131, 744
16 P.2d at 1052. This requirement further bolsters Mr. Cho's arguments.

17 There were numerous other factors contributing to the investments described above. For example,
18 as was repeated frequently at the hearing, the Davises, the Shumways and Noriega invested for two
19 reasons: James Simmons and Alan Davis. But for Alan Davis' relationship with Mr. Simmons and the
20 statements made to Mr. Davis by Mr. Simmons, there would have been no need for the hearing because
21 no one would have invested in FISC. Likewise, the elder Davises and the Shumways invested because
22 of their relationship with Alan Davis and his introduction to *Mr. Simmons*, not Mr. Cho. Further, the
23 Division presented no testimony from Julius Nagorny, let alone any evidence he invested because of
24 Mr. Cho. Julius Nagorny obviously invested because of his son's presence at FISC. As has been
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1 discussed exhaustively, Mr. Cho played no role in connection with the solicitation or management of the
2 Nagorny account, and thus did not participate in the sale. Finally, Mr. Scott's testimony set forth
3 various considerations that motivated him to open his account, and none of them related to Mr. Cho.
4 Mr. Cho was not even a remote factor in connection with the opening of Mr. Scott's account. There is
5 no evidence establishing that Mr. Cho was a substantial factor in connection with any of the above
6 investments. All allegations against him must be dismissed.

7 **III. The Division's reliance on *Barnes v. Vozack*⁸ does not support a finding that any of the**
8 **"primary" Respondents violated A.R.S. § 44-1991.**

9 In addition to Respondents FISC, EVFL, Simmons and Cho, the Division seeks to hold several
10 other Respondents primarily liable for violations of A.R.S. § 44-1991. In particular, the Division argues
11 that Respondents Sharma, Cheng, Yuen, Tokyo and Tam should be primarily liable under A.R.S. §
12 44-991. It is undisputed that Sharma, Cheng and Yuen never talked to any FISC investors, and that
13 Mr. Tam never talked to an FISC investor prior to their investing. Likewise, the Division failed to offer
14 any evidence that the above created the training materials or the training program, gave any direction
15 regarding investors solicitation, created FISC's promotional materials. In fact, the Division offered no
16 evidence that Mr. Sharma, Mr. Cheng or Ms. Yuen were even aware that FISC had any investors.

17
18 The Division, however, alleges that the above individuals are primarily liable for "indirectly"
19 violating the antifraud provisions of the Securities Act. A.R.S. § 44-1991. In an effort to bolster its
20 argument, the Division relies exclusively on *Barnes v. Vozack*, 113 Ariz. 269, 550 P.2d 1070 (1976).
21 The Division claims that *Vozack* stands for the proposition that "principals of a corporation ... that
22 managed a second corporation ... were indirectly but primarily liable for untrue statements ... in
23 violation of A.R.S. § 44-1991 by a securities salesman ... for the second corporation."

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27 ⁸ 113 Ariz.269, 550 P.2d 1070 (1976).

1 The Division gives short shrift to the most significant part of *Vozack*: the *Vozack* defendants
2 *admitted* that they were running the corporation that employed the individual who violated the Securities
3 Act. 113 Ariz. at 273-74, 550 P.2d at 1074-75. Under that scenario, the court readily concluded that the
4 defendants were liable for indirectly violating the Securities Act. The holding in *Vozack* is so
5 unremarkable that *no* Arizona court has cited the portion of *Vozack* relied on by the Division. Because
6 none of the Respondents have admitted running FISC, *Vozack* is distinguishable and of no relevance to
7 the present case. Further, the *Standard Chartered* decision provides the blueprint for determining
8 whether an individual should be liable for violations of the antifraud provisions of the Securities Act.
9 190 Ariz. at 17-23, 945 P.2d at 328-34. *Standard Chartered* has been discussed in detail herein and in
10 the Post-Hearing Memorandum, and Respondents will not subject the Commission to a third analysis of
11 that decision. Rather, Respondents remind the Commission that *Standard Chartered* mandates the
12 dismissal of all allegations against Respondents.

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14 **IV. The Commission must reject several of the Division's allegations regarding violations of**
15 **A.R.S. § 44-1991.**

16 The Commission makes a multitude of unsupported allegations regarding violations of A.R.S. §
17 44-1991. As discussed above, Respondents are not liable because they did not participate in the offer
18 and sale of securities to the FISC investors. If the Commission determines that Respondents are
19 primarily or secondarily liable, however, the Commission should reject the specific allegations set forth
20 by the Division in its discussion of the antifraud provisions of the Securities Act. This pleading will
21 focus on a few of the wholly unsupported allegations.

22
23 **A. Allegation regarding non-disclosure of interest charges on overnight positions.**

24 The Division alleges that Respondents violated the antifraud provisions of A.R.S. § 44-1991(2)
25 because they failed to disclose interest charges on certain overnight positions. The evidence at hearing,
26 however, established that every investor received daily or weekly statements and that each statement
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1 showed the exact amount of interest charged to investors. (Ex. R-3, R-7, R-38, R-42, R-46, R-68 and
2 R-73.) Each investor was fully advised, on a daily or weekly basis of the interest charges. The daily or
3 weekly statements provided FISC investors better information than they would have received if they
4 were customers at a large brokerage firm such as Merrill Lynch. Further, as the Division admits,
5 investors often *earned* interest on overnight positions. Finally, the evidence at hearing established that
6 EVFL was merely passing on interest charges that it was *required* to pay or receiving interest it was
7 entitled to receive. (Ex S-82a, at 49.)
8

9 Assuming arguendo the interest charges were not disclosed prior to an investment in FISC, this
10 alleged omission is not material. The standard of materiality of misrepresented or omitted facts under
11 A.R.S. § 44-1991(2) is objective. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d
12 1131 (Ct. App. 1986). The standard of materiality also contemplates a “showing of a substantial
13 likelihood that, under the circumstances, the omitted fact would have assumed actual significance in the
14 deliberations of the reasonable [buyer].” *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892
15 (App. 1981) (quoting *T.S.C. Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A
16 misrepresented or omitted fact is material only if a reasonable investor would have viewed the
17 misrepresentation or omission as “having significantly altered the total mix of information made
18 available.” *Basic, Inc. v. Levinson*, 45 U.S. 224, 231-32 (1988). Respondents do not commit securities
19 fraud merely by failing to disclose all non-public material information in their possession. *Roeder v.*
20 *Alpha Industries, Inc.*, 814 F.2d 22, 25 (1st Cir. 1987) (citing *Chiarella v. United States*, 445 U.S. 222,
21 235 (1980)). Only those facts, if any, must be disclosed that are needed so that what was revealed
22 would not be “so incomplete as to mislead.” *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir.
23 1990) (quoting *SEC v. Texas Golf Sulfur Co*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc) *cert denied*,
24 394 U.S. 976 (1969). Finally, the Commission must be mindful that alleged material omissions must be
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1 considered “*in light of the circumstances under which they were made.*” A.R.S. § 44-1991(2). In other
2 words, the Division’s allegations must be taken in context, not considered in a vacuum.

3 In the present case, the interest charges were fully and accurately disclosed on each customer
4 statement. No investor decided to close his or her FISC account after reviewing a statement and
5 learning of the interest charges. This evidence, along with the extremely small amounts of interest
6 charged, demonstrate that any omissions regarding interest charges were not material because they could
7 have had no significance in the deliberations of a reasonable investor. *Rose v. Dobras*, 128 Ariz. at 214,
8 624 P.2d at 892. All allegations regarding the non-disclosure of interest paid on overnight positions
9 must be dismissed.
10

11 **B. Allegation regarding non-disclosure to investors that FISC/EVFL was not registered**
12 **as a security.**

13 The Division contends that Respondents violated A.R.S. § 44-1991(2) because they did not
14 disclose that an FISC/EVFL investment was not registered as a security and the attendant risks of
15 non-registration.⁹ *The Division’s Memorandum, however, fails to state any specific risks that were not*
16 *disclosed by FISC and why the non-disclosure was material.* Rather, it merely makes the generic
17 statement that FISC failed to disclose some amorphous risk. The vast majority of securities litigation
18 relates to *registered* securities, and Respondents are at a loss as to the so-called “risks” to which the
19 Division is referring. Absent any context as to what the risks of non-registration were and why the
20 non-disclosure was material, these allegations must be dismissed because there is no evidence
21 establishing that, *in light of the circumstances under which it was made* this alleged omission would
22 have had any significance in the deliberations of a reasonable investor. *Rose v. Dobras*, 128 Ariz. at
23 214, 624 P.2d at 892.
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27 ⁹ Respondents remind the Commission that this allegation, along with all of the Division’s allegations, must be rejected
because the Commission lacks jurisdiction over this matter.

1 Inexplicably, the Division relies on Alan Davis in support of this argument. In particular, *the*
2 *Division relies on Mr. Davis' testimony that he deliberately refused to read any of FISC's account*
3 *documentation to support its claim that Respondents failed to disclose the risks of non-registration. This*
4 *shameless testimony only served to establish Mr. Davis' arrogance and indifference to the risks*
5 *associated with an investment in FISC. If he had only taken the time to read FISC's detailed disclosure*
6 *documents he would have been well-versed in the risks of Forex trading. He chose not to, yet the*
7 *Division seeks to use this conduct to its advantage. Rather than trumpeting this testimony, the Division*
8 *should refuse to present a case on behalf of an investor with such a cavalier attitude. This allegation*
9 *must be dismissed.*

11 **C. Allegation that Respondents gave misleading information regarding the manner in**
12 **which customer orders were executed.**

13 The Division alleges that Respondents violated A.R.S. § 44-1991(2) by failing to disclose the
14 exact manner in which EVFL executed customer orders. Once again, this allegation would be material
15 if there were evidence that customer orders had not been placed, or had been "bucketed." This is not the
16 case, however, and the Division's allegations lack any meaningful context as to why the exact manner in
17 which customer orders were executed is of any significance. When a customer completes new account
18 documentation and opens a brokerage account with a securities firm, the customer is not told of the
19 exact manner in which his or her trades are executed. Counsel is unfamiliar with any cases holding that
20 this practice is somehow fraudulent.

22 If the Division could point to some shortcoming in the method by which EVFL placed its trades or
23 some evidence that trades were not executed or were improperly executed, there would be some context
24 to the allegations. Based on the record before the Commission, however, there is no evidence that *in*
25 *light of the circumstances under which it was made* the alleged omission regarding the execution of
26
27

1 trades would have had any significance in the deliberations of a reasonable investor. *Rose v. Dobras*,
2 128 Ariz. at 214, 624 P.2d at 892. This allegation must be dismissed.

3 **D. Allegation of alleged misleading omission regarding use of investor funds.**

4 The Division also alleges that Respondents failed to disclose the exact location and use of investor
5 funds. The undisputed evidence at hearing however, established that investor money was always in the
6 custody of FISC or EVFL. (Ex. S-159.) More importantly, the Division presented *no* evidence that any
7 Respondent misappropriated investor funds, that trades were in fact not made, that investors' losses were
8 due to anything other than market conditions or that investors did not receive their entire remaining
9 account balances when they closed their accounts. As such, the alleged lack of information regarding
10 the precise location of any investor funds is of no moment.

12 Once again, the Division cannot establish that the alleged omission regarding the use of investors'
13 funds was misleading *in light of the circumstances under which it was made* so as to have had any
14 significance in the deliberations of a reasonable investor. *Rose v. Dobras*, 128 Ariz. at 214, 624 P.2d at
15 892. This allegation must be dismissed.

17 **E. Allegation of alleged misstatements regarding salesmen's qualifications.**

18 The Division alleges that Respondents misrepresented the credentials of its salesmen in violation
19 of A.R.S. § 44-1991(2). The Division claims that Respondents alleged misrepresentations regarding
20 traders' qualifications also constituted a course of business that operated as a fraud or deceit on investors
21 pursuant to A.R.S. § 44-1991(3). These allegations are not supported by the record. The only individual
22 who misrepresented his qualifications was Mr. Simmons, and Respondents should not be held
23 responsible for his folly.

24
25 The linchpin of the Division's argument is an attack on FISC's training program. The Division
26 dismisses FISC's rigorous training program, claiming that it was a "machine of deception" designed
27

1 solely to raise investor funds. This allegation could not be further from the truth. In making its
2 arguments, the Division apparently ignores the testimony of its witnesses, which directly contradicts the
3 Division's theory.

4 The undisputed testimony, *from all witnesses*, was that the vast majority of the training program
5 consisted of *actual training regarding how to trade foreign currency*. The FISC training program was
6 so invaluable and informative that Willis Scott features it on his resume. (R.T. 8/28/98, at 301-02; Ex.
7 R-8.) *Only an extremely small portion at the tail end of the training touched on marketing. For*
8 *example, Mr. Scott characterized the "marketing" portion of the training program as a two hour*
9 *presentation at the end of the training program.* (R.T. 8/28/98, at 349-50.) *Further, William Nagorny*
10 *found the training program so informative that he solicited his father to invest. William Nagorny*
11 *testified specifically that he was "comfortable" enough with everything he had heard during the training*
12 *program such that nothing in his "conscience" caused him to hesitate before asking his father to invest.*
13 (R.T. 9/1/98, at 664.) If FISC truly were the evil empire the Division claims it is, the Division would not
14 have been able to present testimony from two individuals who invested either their own money or their
15 family's money *after* attending the training program. Rather, these individuals would never have
16 invested if FISC's training program was nothing more than a blueprint for fraud. Moreover, if FISC
17 were what the Division claims it was, FISC would not have wasted the time and resources to train and
18 pay potential traders to attend the classes. It simply would have designated one person to trade all
19 accounts and then handed out scripts to the others.

22 Respondents feel compelled to restate the arguments made in the Post-Hearing Brief that *used the*
23 *testimony of the Division's witnesses* to highlight FISC's training program. The formal training program
24 at FISC included classroom instruction, drills, an examination, and mock trading. The following is a
25 non-exhaustive list of the numerous topics covered during FISC's training program:
26
27

1. The factors that could affect the value of a particular currency;
2. What a market order was;
3. How to open and close a position;
4. What a limit order was;
5. The procedures for placing an order at FISC;
6. The set-up of FISC's office;
7. The identity of FISC's "dealer," and the dealer's responsibilities;
8. How to calculate profit and loss for a particular trade;
9. How to minimize losses;
10. What "floating profit and loss" were;
11. What a "breaking point" and a "tolerance level" were;
12. What technical and fundamental analysis were;
13. How to use technical analysis to make trades; and
14. How to calculate "support" and "resistance" levels.

(R.T. 8/28/98, at 291-94, 298-300, 304-07; R.T. 9/1/98, at 646-51.)

The training program also had numerous handouts, which are found in exhibits R-9 through R-36. Traders were specifically instructed regarding the risks and pitfalls of foreign currency trading, the cardinal mistakes in foreign currency trading, and the myriad ways by which traders could lose their money. (Ex R-12.) Traders also received a document that talked specifically about the risks in foreign currency trading and explained that most foreign currency traders were unsuccessful. (Ex. R-13.) These materials, which were specifically reviewed with the traders, were replete with references to the incredibly risky nature of foreign currency trading. (R.T. 8/28/98, at 320-31; R.T. 9/1/98, at 653-56; Ex. R-12, R-13.) The testimony of Mr. Nagorny and Mr. Scott, along with the reams of material provided

1 by FISC, ensured that no individual who sat through the training program would be unaware of the
2 tremendous risk in foreign currency trading.

3 FISC's Customer Agreement and Risk Disclosure Statement were also designed to ensure that
4 FISC investors were fully advised of the risks of foreign currency trading. (See Ex. R-47-48.) These
5 documents were signed by all FISC investors at the time they invested. Mr. Nagorny recounted how the
6 instructors in the training program went over the Customer Agreement and Risk Disclosure Statement
7 line-by-line to ensure that the traders understood it and could explain it to potential investors. (R.T.
8 9/1/98, at 667-678.) Mr. Cho specifically told the traders that they had to review the Risk Disclosure
9 Statement with all potential investors; that they must discuss risk with potential clients; and that they
10 must not make any promises or guarantees. (R.T. 8/28/98, at 207-08; R.T. 10/8/98, at 2186-93.)
11 Further, these documents contained numerous statements regarding the speculative nature of an
12 investment in foreign currency trading. (Ex. S-57.)
13

14 The training program also provided specific instruction that traders were *not* to make
15 misrepresentations to potential investors. (R.T. 9/8/98, at 2186-93.) Mr. Scott's testimony established
16 that Mr. Cho took extreme measures to ensure that traders provided full and accurate disclosure to
17 potential investors, and did not misrepresent their qualifications. (R.T. 8/28/98, at 350-52.) The
18 following excerpts from Mr. Scott's testimony bear repeating:
19

20 Q. And did he ever tell you to exaggerate or lie about your trading abilities?

21 A. No. I kind of don't understand the question.

22 Q. Did he ever tell you to go out and say I'm the best damn trader there is?

23 A. No.
24

25 (*Id.* at 351.)
26
27

1 FISC and Mr. Cho were committed to giving accurate information to investors and not
2 misrepresenting traders' qualifications. Otherwise, we would have heard a completely different story
3 from Mr. Scott and Mr. Nagorny. The Commission must distinguish the unfortunate misrepresentations
4 made by Mr. Simmons from the conscientious effort by FISC to train traders and ensure that investors
5 were fully advised of the risks of foreign currency trading and that salesmen did not misrepresent their
6 qualifications. There is no evidence that any Respondent told Mr. Simmons to make the
7 misrepresentations he made. Likewise, there is no evidence that anyone told Mr. Simmons to attempt to
8 incorporate Mr. Cho's credentials into his presentations.
9

10 Most importantly, there is also *no evidence of any individual Respondent, other than Mr. Simmons,*
11 *misrepresenting his credentials to a potential investor.* This lack of evidence establishes that the
12 Division cannot meet its burden of establishing that Respondents misrepresented the credentials of
13 FISC's traders *to investors* and violated A.R.S. § 44-1991(2) or (3) in connection with the sale of
14 investments in FISC. Only Mr. Simmons misrepresented his credentials, and the Order should so
15 reflect.
16

17 **V. The Division proposes a controlling person analysis that rejects the majority view and**
18 **misstates the caselaw on which the Division relies.**

19 The Division alleges that certain Respondents should be liable as controlling persons for the
20 conduct of some of the other Respondents. As the Division's Post-Hearing Memorandum sets forth, and
21 as was detailed in Respondents' Memorandum, the vast majority of the evidence against the controlling
22 persons is limited to evidence that these individuals were in fact officers of some of the entities at issue.
23 The Division, apparently after reviewing the controlling person caselaw, realized that the ninth circuit
24 has adopted the majority view in connection with its controlling person analysis, and requires proof of
25 more than the mere fact that an individual is an officer of an issuer in order to establish controlling
26 person liability. *Paracor Finance v. General Electric Capital Co.*, 79 F.3d 878, 888-89 (9th Cir. 1996).
27

1 As set forth in Respondents' Memorandum, the adoption of the ninth circuit standard would be
2 devastating to the Division's case and result in the dismissal of all controlling person allegations.

3 Because, however, the ninth circuit caselaw does not comport with the Division's theory of the
4 case, the Division asks the Commission to adopt the "minority" view, which is in fact the view of only
5 one court, the fifth circuit.¹⁰ See *Abbott v. Equity Group, Inc.*, 2 F.3d 613 (5th Cir. 1993); *G.A.*
6 *Thompson & Co., Inc. v. Partridge*, 636 F.2d 945 (5th Cir. 1981) In particular, the Division asks the
7 Commission to adopt one of the two following standards for whether an individual is a controlling
8 person: 1) did the alleged control person have the power to control the general affairs and policies of the
9 primary violator; or 2) did the alleged control person have a) the power to control the general affairs of
10 the primary violator; and b) did the alleged control person have the power to control the specific policy
11 that resulted in primary liability. In other words, assuming that the Division establishes that an
12 individual is an officer of a corporation, the individual is strictly liable for the conduct of all of its
13 agents, *regardless of whether the Division can show the officer's knowledge of the alleged conduct, let*
14 *alone participation in the wrongful conduct.*¹¹

15
16 The fatal flaw in the Division's reasoning, however, is that the cases it relies on are inapplicable.
17 For example, in *Abbott*, the plaintiffs could not establish that the defendants had actual control over the
18 alleged wrongdoer, and the court readily dispensed with the controlling person allegations. *Abbott*, 2
19 F.3d at 619-21. Because the plaintiffs were unable to establish *actual control*, the court specifically held
20 that it was unnecessary to reach the issue of whether plaintiffs had to show that the defendants *exercised*
21

22
23
24 ¹⁰ The Division seeks to support its reliance on the fifth circuit's view by citing a recent Arizona case in which the court
25 of appeals adopted the fifth circuit standard for determining whether a particular investment met the elements of the
26 definition of a security. See *Nutek Information Systems, Inc. v. Arizona Corp. Com'n.*, 281 Ariz. Adv. Rep. 34 (App.
27 November 5, 1998). The Division fails to disclose, however, that in *Nutek* the parties agreed that the court's analysis
should be guided by the fifth circuit. *Id.* at 36.

¹¹ Respondents contend that the analysis set forth in their Post-Hearing Memorandum also demonstrates that the
Division cannot establish that Respondents had the power to control FISC's conduct, and this pleading in no way
constitutes a waiver of that argument.

1 control. *Id.* at 620. *Abbott* thus did not involve a scenario such as the present one, where, *on paper*
2 *only*, an individual may appear to have control over a violator but there is a complete lack of evidence of
3 the *exercise* of that control. In other words, *Abbott* stands for the unremarkable proposition that a
4 defendant cannot be a control person absent the minimal showing that he had the power to control the
5 primary violator. Because the court never reached the issue of whether an individual who has control
6 over a primary violator, but does not exercise control and is unaware of the wrongful conduct should be
7 liable as a controlling person, *Abbott* is of no assistance.

8
9 The 11th circuit caselaw cited by the Division parallels *Abbott*. *Brown v. Enstar Group, Inc.*, 84
10 F.3d 393 (11th Cir. 1996). The following language from *Brown* bears repeating: “[b]ecause we hold
11 *infra* that [the alleged control person] neither possessed nor exercised power over [the alleged controlled
12 person] ... , we do not need to decide here whether ‘power to control the general affairs of the entity
13 primarily liable’ means simply abstract power to control or actual exercise of the power to control.” *Id.*
14 at 396. In other words, like *Abbott*, *Brown* never reached the issue of whether an individual with
15 abstract control over an entity must *exercise* that control before they can be held liable as a control
16 person. Because the present case involves a scenario where the Respondents at issue may have had
17 “abstract” control, the cases cited by the Division are irrelevant and distinguishable. In other words, the
18 Division is asking the Commission to hold what no court has held and determine that “abstract” control
19 means “absolute” control. The Commission should reject this argument and follow the 9th circuit
20 caselaw relied on by Respondents.

21
22 The Division is left with its argument that the remedial purpose of the Securities Act justifies the
23 draconian standard the Division proposes. Although A.R.S. § 44-1999 was passed in 1996, the Division
24 relies on language regarding the remedial purpose of the Securities Act that was included in the “Intent
25
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1 and Construction” section of the Arizona Securities Act when it was adopted in 1951, nearly fifty years
2 ago.

3 Even the remedial purpose of the Securities Act is not served by adopting the Division’s position,
4 because it is a position without support in any court in the United States. The Division seeks to use the
5 remedial purpose of the Securities Act to hold officers of a corporation strictly liable for the conduct of
6 its agents regardless of whether the officers knew the wrongdoers, were aware of the conduct at issue or
7 had notice of the conduct. Moreover, according to the Division, an officer is strictly liable for the
8 conduct of his agent even if the officer is out of the country when the conduct takes place and cannot be
9 linked to the conduct, and even if the officer (such as Ms. Yuen or Mr. Zhang) does not have signatory
10 power over any of the bank accounts to which investors funds are deposited or transferred.
11

12 Adoption of the Division’s argument would do a grave disservice to the Securities Act, and its
13 implications are staggering. For example, every time the Division brings an action against a Merrill
14 Lynch salesman, Merrill Lynch’s president and corporate officers must be named as parties, regardless
15 of whether they were aware of the underlying conduct. Further, adopting the Division’s standard puts
16 Respondents at the whim of an agency that can selectively prosecute the officers of entities it has a
17 personal distaste for, yet not take action against other corporations.
18

19 There comes a time when the Commission must harness the Division and impose some limitations
20 on its power. Now is the time. The Commission should apply the ninth circuit caselaw set forth in
21 Respondents’ Memorandum and reject the standard proposed by the Division. Respondents are not
22 liable as controlling persons.
23

24 **VI. The Division’s proposed legal analysis regarding the “good faith” defense to controlling
25 person allegations is untenable.**

26 The Division also proposes a legal analysis regarding the “good faith” defense to the controlling
27 person allegations. The Division suggests that, as a separate prong of the good faith defense,

1 Respondents must prove their absence of *scienter*. The Division then somehow claims that Respondents
2 must prove a lack of *scienter* to establish the good faith defense even though the Division need not prove
3 *scienter* as to any Respondents. The Division next makes the remarkable, unprecedented and baffling
4 proposal that Respondents must present “affirmative evidence where applicable that the control person
5 ‘did not directly or indirectly induce the act’ by inaction.” These arguments defy logic and ignore the
6 caselaw interpreting the good faith defense.

7
8 As the ninth circuit succinctly holds, the good faith defense merely requires evidence that
9 Respondents “acted in good faith and did not directly or indirectly induce the act or acts constituting the
10 violation...” *Arthur Children’s Trust v. Keim*, 994 F.2d 1390, 1398 (9th Cir. 1993). More importantly,
11 however, the ninth circuit has also held that evidence establishing that a defendant’s control was “less
12 than absolute [is] sufficient to prove [the] good faith defense as a matter of law” *Paracor Finance,*
13 *Inc. v. General Electric Capital Corp.*, 79 F.3d 878, 891 (9th Cir. 1996). Therefore, the arguments set
14 forth in Respondents’ Memorandum regarding the lack of evidence that Respondents were controlling
15 persons also establish the good faith defense. *Id.* See also *Kaplan v. Rose*, 49 F.3d 1363, 1382-83
16 (uncontroverted declaration of good faith sufficient to establish good faith defense).

17
18 *Paracor Finance* warrants further discussion because of its similarity to the present facts. In
19 *Paracor*, investors filed suit alleging federal securities violations against the CEO of a company that
20 made a debenture offering. 79 F.3d at 883. The court held that the CEO had established the good faith
21 defense, even though he was “at least consulted on every major decision.” *Id.* at 890. The CEO knew
22 the offering was taking place and understood what the Placement Memorandum was supposed to
23 disclose, but he never read the Placement Memorandum himself. *Id.* He was involved in developing the
24 sales projections contained in the private placement memorandum, but “at the time, there was no way
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1 [the CEO] could be aware that the projections would be used in the Placement Memorandum six months
2 later.” *Id.*

3 In holding that the CEO had established the good faith defense, the court stated: “[the CEO] knew
4 that there was a debenture offering, but *the Investors have not introduced any evidence that he was*
5 *involved in its workings in any significant way.* Thus, [the CEO] did not ‘directly or indirectly induce
6 the acts constituting the violation or cause of action.’” *Id.* As set forth in Respondents’ Memorandum
7 and herein, the Division has failed to establish that any of the alleged controlling person Respondents
8 were involved in FISC’s operation in any significant way.
9

10 The lack of evidence regarding Respondent Yuen provides an example of the applicability of the
11 good faith defense to the present case. Assuming arguendo the Commission considers Ms. Yuen to be a
12 controlling person merely because she signed a couple of documents for FISC, her testimony
13 demonstrates conclusively that her invocation of the good faith defense should prevail. In her
14 deposition, Ms. Yuen testified as follows:

15 1. She never had any possession of the FISC documents the Division attempted to subpoena
16 from her. (S-81, at 20.)
17

18 2. She had no connection to Tokyo and wasn’t “very clear” as to the nature of its business.
19 (*Id.* at 28.)

20 3. She had no experience in and knew nothing about foreign currency trading. (*Id.* at 30.)

21 4. She did not know the nature of FISC’s business. (*Id.* at 49.)

22 5. She never invested any money in FISC. (*Id.* at 34.)

23 6. She did not know where the money came from to open FISC. (*Id.* at 38.)

24 7. Mr. Tam never reported to her regarding FISC and never asked her for any advice
25 regarding FISC. (*Id.* at 43-44.)
26
27

1 8. She did not know who was in charge of FISC's offices. (*Id.* at 44.)

2 To determine that Ms. Yuen has *any* responsibility in this case would be a grave injustice, as it
3 would be for the remainder of the Respondents. If the Commission finds that any of the Respondents
4 are liable as controlling persons, it must nevertheless dismiss all allegations against those Respondents
5 because they acted in good faith and did not directly or indirectly induce the conduct at issue.

6 **VII. If the Commission orders payment of any penalties or restitution it should be against**
7 **Respondent Simmons, and none of the other Respondents.**

8 The above arguments demonstrate that the Respondents have not violated the Securities Act and
9 should, therefore, not be ordered to pay any restitution or administrative penalties. If, however, the
10 Commission disagrees with Respondents and determines that some Respondents have violated the
11 Securities Act, the Commission should use its discretion and not order Respondents to pay any
12 restitution or administrative penalties.

13 A.R.S. §44-2032(1) provides that the Commission *may* order restitution if it determines that an
14 individual has violated the Securities Act. Likewise, A.R.S. §44-2036 provides that the Commission
15 *may* assess administrative penalties for violations of the Securities Act. A case such as the present one
16 requires a thoughtful exercise of the Commission's discretion and the separate consideration of *each*
17 Respondent's role, or lack of a role in the investment program at issue.

18 The Division seeks to paint all of the Respondents with the same broad brush strokes.
19 Remarkably, the Division seeks penalties against the Respondents that greatly exceed the penalty
20 proposed against Mr. Simmons. This case, however, was brought because of Mr. Simmons' folly. He
21 intentionally disregarded and abused the safeguards in place at FISC, and he also ignored the clear
22 message of FISC's training program. The Division was unable to prove conduct by any other
23 Respondent that remotely approached that of Mr. Simmons, and was unable to prove that the vast
24 majority of Respondents were ever in Phoenix or talked to any investors, let alone were responsible for
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1 controlling the corporate entities at issue. Accordingly, any order must take into account the glaring
2 differences between Mr. Simmons and the other Respondents.

3 Also, the Commission should not order restitution to individuals who traded their own accounts or
4 who traded on behalf of their families, such as Mr. Scott and Mr. Nagorny. These individuals attended
5 FISC's training programs; they were fully advised of the risks in foreign currency trading; they were not
6 pressured to open their own accounts; and they made all investment decisions in their accounts. In
7 addition to Mr. Scott and Mr. Nagorny, the following individuals traded their own accounts:
8 Mr. Benson, Mr. Becker, Mr. Lares, Mr. Fox and Mr. Unlucomert. (Ex. S-138.)
9


10 At a minimum, the Commission should not order any restitution to any individuals who traded
11 their own accounts or who traded on behalf of their families. Likewise, as has been discussed in detail,
12 there is no basis to hold Mr. Cho accountable for any restitution, let alone the staggering amount
13 recommended by the Division. Finally, the Commission's Order must recognize the enormous gulf
14 between the conduct of Mr. Simmons and the remaining Respondents, and only order Mr. Simmons to
15 pay penalties and restitution.
16

17 **VIII. Conclusion.**

18 Mr. Simmons is the only Respondent who should be subject to a Commission Order. The
19 remaining Respondents are neither primarily nor secondarily liable for any violations of the Securities
20 Act. The allegations against all Respondents with the exception of Mr. Simmons must be dismissed.
21
22
23
24 ...
25 ...
26 ...
27

1 DATED this 1st day of June, 1999.

2 ROSHKA HEYMAN & DEWULF, PLC

3
4 By 

5 Paul J. Roshka, Jr.

6 Alan S. Baskin

7 Two Arizona Center

8 4 00 North 5th Street, Suite 1000

9 Phoenix, Arizona 85004

10 Attorneys for Respondents

11 ORIGINAL and ten copies of the foregoing
12 hand-delivered this 1st day of June, 1999 to:

13 Docket Control
14 Arizona Corporation Commission
15 1200 West Washington Street
16 Phoenix, Arizona 85007

17 COPY of the foregoing hand-delivered
18 this 1st day of June, 1999 to:

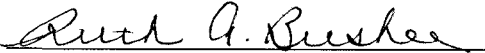
19 Mark C. Knops
20 Senior Counsel
21 Securities Division
22 Arizona Corporation Commission
23 1300 West Washington, 3rd Floor
24 Phoenix, Arizona 85007

25 Hearing Officer
26 Hearing Division
27 Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Robert A. Zumoff
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007

1 COPY of the foregoing mailed
2 this 1st day of June, 1999 to:

3 Chris R. Youtz
4 Sirianni & Youtz
5 3410 Columbia Center
6 710 Fifth Avenue
7 Seattle, Washington 98104-7032
8 Counsel for Respondents

9 
10 roshka/tokyo/pl rt div post-hr mm.doc